36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 508.

SLAVERY IN THE TERRITORY OF NEW MEXICO.

[To accompany Bill H. R. No. 64.]

MAY 10, 1860.—Ordered to be printed.

Mr. BINGHAM, from the Committee on the Judiciary, made the following

REPORT.

The Judiciary Committee, having had under consideration the bill referred to them entitled "A bill to repeal all acts of the legislature of New Mexico authorizing slavery or involuntary servitude, except as punishment for crime," report the same back to the House of Representatives, with an amendment that the same do pass, and that it be put upon its passage; that the committee further report that for the organization of said Territory of New Mexico by the act of September 9, 1850, (U. S. Statutes at Large, vol. 9, p. 449, sec. 7,) it is provided that "all the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and void."

The territorial statutes referred to in the bill, and certain sections whereof are disapproved thereby and declared null and void, are as follows: "An act amendatory of the law relative to contracts between masters and servants," approved by the territorial legislature of New Mexico January 26, 1859.

SECTION 1. When any servant shall run away from the service of his master he shall be considered as a fugitive from justice, and in such case it shall be the duty of all officers of the Territory, judicial or ministerial, on being informed that such persons are within the limits of their jurisdiction, to ascertain whether such persons are runaway servants or not, and if they ascertain that they are, said officers shall immediately arrest them and put them to work at public labor, or hire them out to any person so that they may be employed, with security, until their master shall be informed thereof, in order that they may demand them, and to whom they shall immediately be delivered.

SEC. 2. Every person of this Territory, either a contracted servant according to the law of contracts, or engaged on trips or as shepherds, shall be compelled to serve for the time stipulated for in the contract; and any servant so contracted who shall fail to serve by abandoning [illegible] property placed under his care, shall be held responsible

for all costs and damages which through his neglect may result to the owner: *Provided*, That in the same manner in which the servants shall be compelled to comply with this contract, the masters should also be equally obliged, in case any servant should fall sick on any trip, to furnish them, at their own expense, the means of cure, and shall not, under any circumstances, abandon them; but, on the contrary, shall convey them to their homes, where the said servants may be able to procure the means necessary for their subsistence.

SEC. 3. No person shall employ the servant of another without becoming responsible by such act to pay the money due on the first contract; and if they shall furnish him with any money, and the servant shall be compelled to return to the service of his first master for the reason that the second did not have or did not desire to pay the money due, in such case the second contractor shall lose his claim, or shall be compelled to wait until the servant shall have paid the money of the first contractor.

SEC. 4 No court of this Territory shall have jurisdiction nor shall take cognizance of any cause for the correction that masters may give their servants for neglect of their duties as servants, for they are considered as domestic servants to their masters, and they should correct their neglect and faults; for as soldiers are punished by their chiefs, without the intervention of the civil authority, by reason of the salary they enjoy, an equal right should be granted those persons who pay their money to be served in the protection of their property: *Provided*, That such correction shall not be inflicted in a cruel manner with clubs or stripes.

SEC. 5. Sections fourteen and fifteen of an act approved July 20, 1851, relative to contracts between masters and servants, are hereby repealed.

SEC. 6. That all acts or parts of acts, laws or parts of laws, in conflict with this act are hereby repealed.

SEC. 7. This act shall be in force and take effect from and after its passage.

"AN ACT to provide for the protection of property in slaves in this Territory," approved by the territorial legislature of New Mexico, February 3, 1859.

SECTION 1. That every person who shall be convicted of the unlawful killing of a slave, or other offence upon the person of a slave, within this Territory, whether as principal or accessory, shall suffer the same pains and penalties as if the party upon whose person the offence was committed had been a free white person.

SEC. 2. Every person who shall steal any slave with the intent that the owner, or any one having an interest in such slave, present or future, vested or contingent, legal or equitable, shall be deprived of the use or benefit of such slave, shall, upon conviction, suffer imprisonment for a term not more than ten nor less than four years, and be fined in a sum not more than two thousand nor less than five hundred dollars; and every person who shall, by violence, seduction, or other means, take and carry or entice away any slave with the like intent shall be deemed and held, for every purpose

whatever, to have stolen such slave within the meaning of this act. And every person who, knowing any slave to have been stolen as aforesaid, shall aid, assist, or advise in or about the carrying away of such slave, shall suffer the like penalties as are above prescribed against the person stealing such slave as aforesaid.

SEC. 3. Every person who shall carry or convey, or wilfully assist in carrying or conveying any slave, the property of another, with the intent or for the purpose of aiding or enabling such slave to escape out of this Territory, or within this Territory and beyond the control or recovery of his owner or master, shall, upon conviction thereof, suffer the same penalties as are prescribed in the foregoing section of this act. And in any indictment preferred against any person for the violation of any of the provisions of this act, the property in the slave shall be well laid, if charged to belong to any person having an interest in such slave, whether such interest be legal or equitable, present or future, joint or several, vested or contingent

SEC. 4. Every person who shall forge or furnish to any negro, free or slave, any false or fabricated free papers, or false evidences in print or writing, of the freedom of such negro, shall, upon conviction, suffer imprisonment for a term not more than five years, nor less than six months, and be fined in a sum not more than one thousand, nor less than one hundred dollars.

SEC. 5. Any person who shall hire, entice, persuade, or in any manner induce any slave to absent himself from the service or custody of his owner or master, or who shall, upon any pretence, harbor, or maintain any slave so absenting himself from such service or custody, shall, upon conviction thereof, suffer fine and imprisonment as prescribed in section four of this act, and shall besides be liable to the owner or master in a civil suit for damages.

SEC. 6. Any person who shall endeavor to excite in any slave a spirit of insurrection, conspiracy or rebellion, or who shall advise, countenance, aid, or in any manner abet any slave in resistance against his owner or master, shall, upon conviction, suffer imprisonment not less than three months, nor more than three years, and be fined in a sum not less than twenty-five, nor more than one thousand dollars.

SEC. 7. Any person who shall sell, lend, hire, give, or in any manner furnish to any slave any sword, dirk, bowie-knife, gun, pistol, or other fire-arms, or any other kind of deadly weapons of offence, or any ammunition of any kind suitable for fire-arms, shall, upon conviction, suffer the penalties prescribed in section six of this act: *Provided*, That nothing herein contained shall be so construed as to prohibit the owner or master of any slave from temporarily arming such slave with such weapon and ammunition for the purpose of the lawful defence of himself, his family, or property.

SEC. 8. All trade or traffic between free persons and slaves, in any article of goods, merchandise, provisions, supplies, or other commodity whatever, is hereby prohibited, unless the slave have and exhibit the permission of his owner or master, in writing, to trade or traffic, which written permission must specifically set forth the articles or commodities which said slave is authorized to sell, buy, or barter, and any person who shall violate the provisions of this section shall,

upon conviction, suffer the penalties prescribed in section six of this act. And if any person other than the owner or master of such slave shall furnish to any such slave any fabricated, false, or forged permit to trade as aforesaid, he shall suffer the same penalties as are prescribed in the said sixth section of this act.

SEC. 9. Any free person who shall play with any slave at any game of cards, or any other game of skill, chance, hazard, or address, either with or without betting thereon, shall be held guilty of a misdemeanor, and be fined in a sum not exceeding one hundred dollars, or imprisoned not exceeding three months, or both, at the discretion of the court.

SEC. 10. Any person may lawfully take up or apprehend any slave who shall have run away, or be absenting himself from the custody or service of his master or owner, and may lawfully use or employ such force as may be necessary to take up or apprehend such slave; and such person, upon the delivery of such slave to his master or owner, or at such place as such master or owner may designate, shall be entitled to demand or recover by suit any reward which may have been offered for the apprehension or delivery of such slave. And if no reward has been offered, then such person so apprehending such slave shall, upon the delivery of such slave to his master or owner, or to the sheriff of the county in which such slave was apprehended, be entitled to demand and recover from such owner or master the sum of twenty dollars, besides ten cents for each mile of travel to and from the place where such apprehension was made.

SEC. 11. If any sheriff of any county within this Territory shall fail or refuse to receive and keep, with proper care, any runaway slave so offered to him for safe-keeping by such person apprehending the same, or his agent, such sheriff shall, upon conviction thereof, be fined in a sum not less than five hundred dollars, to the use of the Territory; shall further be liable to the owner of such slave for his value, recoverable by civil suit, and shall be ineligible for re-election to the said office.

SEC. 12. The said sheriff, upon receiving such runaway into his custody as aforesaid, shall forthwith cause to be inserted in some public newspaper of this Territory a full and particular description of such slave, stating therein the date of his commitment to jail as a runaway, which advertisement he shall cause to be continued for the space of six months, unless such slave shall sooner be delivered up to his owner or master, upon proof of ownership or right of possession, and payment of all costs, as hereinafter provided.

But if, at the expiration of six months from the date of the first insertion of such advertisement, no owner or master shall appear and reclaim his said slave, then it shall be the duty of the said sheriff to cause to be inserted in such newspaper a further advertisement, setting forth, as before, a full description of such slave, with the date of his commitment as aforesaid, and a recital of the former advertisement, and giving notice that upon a particular day to be named, not less than six nor more than seven months subsequent to the first insertion of such advertisement, he will, at the door of his jail or of the courthouse of his county, sell the said slave to the highest bidder for cash.

And on the sale-day so appointed the said sheriff, or his successor in office, shall accordingly, between the hours of twelve o'clock m. and two o'clock p. m., at the place of sale, offer at public vendue and sell to the highest bidder for cash, the said slave, and shall execute to the purchaser his bill of sale for such slave, which shall vest in such purchaser a good and indefeasible title against all persons whatever: *Provided*, however, that if the owner or master shall, at any time before such sale, appear and reclaim the said slave as hereinafter provided, and pay all costs and expenses due to the said sheriff, the taker up, and the newspaper, (for all which the sheriff is authorized to receipt,) then such slave shall be delivered up to such owner or master.

SEC. 13. Before any slave, in custody of the sheriff as a runaway, shall be delivered up to any claimant, such claimant shall first prove by the affidavit of some disinterested person, taken before some judge, justice of the peace, or notary public, (whose official characters, if officers of another State or Territory, shall be legally authenticated,) that he, the claimant, has lost such a slave as described in the advertisement aforesaid; second, the claimant shall make his own affidavit that the slave in custody is the identical slave so lost, and to which he is entitled as owner or master, (or as agent for the owner or master, producing authority as such agent by power of attorney duly acknowledged and authenticated;) third, give bond to the said sheriff, with security to be approved by him, to indemnify him against the lawful claims of all other persons to such slave; fourth, pay all costs and charges, as follows: the fee for apprehension as aforesaid, with mileage, the sheriff's costs of one dollar for receiving such slave into custody, one dollar for each advertisement made as aforesaid, and ten cents per day for each day the said slave has remained in his custody; and also the costs of the newspaper for the advertisement of such slave.

SEC. 14. If, after delivering up such slave to such claimant, any other person should appear and demand the said slave as his right and property, the said sheriff shall assign and deliver the said bond to such person, who may thereon institute suit in his own name and recover the value of said slave, and all damages from the makers of such bond; but the said sheriff shall be thereby fully acquitted of all liability on account of the said slave: *Provided*, Nothing herein shall be construed to prevent the true owner from proceeding against the person in possession of such slave for the specific recovery of such slave, or for any other redress against such person as he may be legally entitled to.

SEC. 15. In case such slave shall be sold, as provided in section 12, then it shall be the duty of the said sheriff, after first deducting the costs and charges aforesaid, and the further costs of five per cent. upon the proceeds of such sale as his commission thereon, to pay over the surplus of such proceeds to the territorial treasurer, taking a receipt therefor, and filing with such treasurer a statement of all costs and charges retained by him as aforesaid; and the said treasurer shall duly charge himself with and account for such proceeds as for other public funds.

SEC. 16. If any person shall fail to maintain or properly provide food, lodging, and raiment for any slave of which he is the owner, any

judge of the district court, probate judge, or justice of the peace, may, and upon sworn information made before him shall, cause such person by his warrant to be brought before him, and upon investigation and proof of such facts, in a summary manner without appeal. Such judge, or justice, may require such person to enter into bond with sufficient surety, payable to the Territory in such sum as he shall require, and conditioned for the support and maintenance of such slave in the future, which bond may at any time thereafter be put in suit upon the affidavit of any person that the same has become forfeited.

SEC. 17. When a slave shall be indicted for felony, the clerk of the court, upon the arrest of such slave, or return of such indictment, shall issue a citation to the owner or master named in such indictment, requiring him to appear and defend his said slave; and in case such owner or master shall not so appear, it shall be the duty of the court trying the same to appoint counsel for such slave, who shall be authorized to direct the summons of all witnesses for the defence, and in all respects to conduct the same; and the court shall allow to each counsel a reasonable fee for his services, and tax the same as other costs, and award execution against the owner therefor.

SEC. 18. Any owner of a slave indicted and convicted of cruel and inhuman treatment to such slave shall be punished by imprisonment not more than one year, and a fine not more than one thousand dollars.

SEC. 19. Any owner of a slave who shall suffer such slave to hire his own time, or go at large and employ himself as a free man, for more than twenty-four hours for any one time, shall, upon the conviction thereof before any justice of the peace, be fined in a sum not exceeding one hundred dollars, to inure to the county treasury.

SEC. 20. Any slave who shall conduct himself disorderly in a public place, or shall give insolent language or signs to any free white person, may be arrested and taken by such person before a justice of the peace, who, upon trial and conviction in a summary manner, shall cause his constable to give such slave any number of stripes upon his bare back not exceeding thirty-nine.

SEC. 21. When any slave shall be convicted of any crime or misdemeanor, for which the penalty assigned by law is in all or in part of a sum of money, the court passing sentence upon him may, in its discretion, substitute for such fine corporal punishment by branding or with stripes.

SEC. 22. No slave, free negro, or mulatto shall be permitted to give evidence in any court against a free white person, but against each other they shall be competent witnesses.

SEC. 23. Marriages between white persons and slaves or free negroes or mulattoes are prohibited, and such rites of matrimony are declared void; and any free white person attempting to enter into or procure a marriage with such slave, or free negro or mulatto, upon indictment and conviction, shall be punished with imprisonment not exceeding six months, and fine not exceeding three hundred dollars.

SEC. 24. Any slave, free negro, or mulatto who shall commit or attempt to commit a rape upon the person of any white woman shall, upon conviction thereof, suffer death.

SEC. 25. The emancipation of slaves within this Territory is totally prohibited.

SEC. 26. No slave shall be permitted to go from the premises of his owner or master after sunset and before sunrise without a written pass specifying the particular place or places to which such slave is permitted to go; and any white person is authorized to take any slave who, upon demand, shall not exhibit such pass before any justice of the peace, who, upon summary investigation, shall cause such slave to be whipped with not more than thirty-nine stripes upon his bare back, and to be committed to the jail or custody of a proper officer, to be released the next day on the demand and payment of costs by the owner or master.

SEC. 27. Any person claiming to be entitled to the possession of any slave which is withheld from him, may either institute his action of replevin therefor as for other property, or upon his sworn petition, directed to the district judge of the district wherein such slave may be, shall be entitled to the writ of *habeas corpus* directed to the person having such slave in possession, upon which such proceedings shall be had as are now had upon such process when instituted for other persons; and if the judge, upon hearing such, shall see fit, he may require the party to whom he adjudges the possession of the slave to enter into such bond to such amount, and with such security as he shall approve, payable to the adverse party, conditioned for the safe delivery of said slave, to abide the judgment or decree of any court of competent jurisdiction, which may be rendered in any suit to be instituted within six months from the date of such bond, which bond, upon breach thereof, may be prosecuted to judgment against the makers of the same, or any of them, by the payee thereof, his executors, or administrators, or assigns; and any court of chancery shall entertain a bill for the specific recovery of any slave without allegation or proof of peculiar value or *pretium affectionis*.

SEC. 28. Any person who shall hold as slave any negro or mulatto who is entitled to his freedom, shall, upon conviction, suffer imprisonment for a term not exceeding ten nor less than five years, and be fined in a sum not less than five hundred nor more than two thousand dollars.

SEC. 29. When a word in this act is used in the masculine form it shall include the feminine; where used in the singular, it shall include the plural, and *vice versa;* and the word "master" shall be taken to include any person who, whether as owner, bailee, or otherwise, has or is entitled to have the immediate possession or control of the slave.

SEC. 30. That this act shall in no manner apply to relation between masters and contracted servants in this Territory, but the word "slave" shall only apply to the African race.

SEC. 31. That this act shall be in force from and after its passage.

MINORITY REPORT.

Mr. TAYLOR, from a minority of the Committee on the Judiciary, submitted the following views:

The undersigned, a minority of the Committee on the Judiciary, to whom was referred bill H. R. No. 64, "to disapprove and declare null and void all acts and parts of acts heretofore passed by the legislative assembly of New Mexico, which establish, protect, or legalize involuntary servitude or slavery within said Territory," &c., respectfully submit the following report:

A temporary government, under the authority of the United States, was organized by an act of Congress, approved September 9, 1850, to extend over the country embraced in the present limits of what is known as "the Territory of New Mexico." By the seventh section of this act it was declared that the legislative power of the government thus organized should "extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of the act;" and it was also provided that all the laws passed by the legislative assembly should be submitted to the Congress of the United States, and that, if Congress disapproved of them, they should "be null and of no effect." In the second section of the same act it was further provided "that, when admitted as a State" into the federal Union, "the said Territory, or any portion of the same, shall be received into the Union, with or without slavery, as their constitution may prescribe at the time of their admission."

The legislative assembly of the Territory of New Mexico, in the performance of the functions conferred on it, by an act entitled "An act amendatory of the law relative to contracts between masters and servants," approved January 26, 1859, provided that "no court" of the Territory "shall have jurisdiction" or "take cognizance of any cause for the correction that masters may give their servants for neglect of their duties as servants," when "such correction" is not "inflicted in a cruel manner with clubs or stripes;" and by another act, approved February 3, 1859, which is entitled "An act to provide for the protection of property in slaves in this Territory," it established various police regulations necessary to make the services of slaves useful to their owners, and provided for the punishment of different offences by third persons against the rights of those having a claim to these services. The bill referred to us proposes to exercise the power reserved to Congress in the last clause of the seventh section of the organic act, in such a manner as will defeat the action of the territorial legislature for the amendment of their pre-existing legislation with respect to a particular class of contracts, and will also have the

effect of preventing the people of the Territory from giving the protection they desire to give to every species of property recognized within the limits of the United States, and which the citizens of the United States, coming from a portion of the States, might see fit to bring with them into that Territory.

Such a proposition is of the gravest importance, for action upon it necessarily involves a decision upon the powers of Congress, and upon the rights of the citizens of the several States, and of the United States, in the Territories of the United States. Without the provisions embodied in the act of the territorial legislature of New Mexico, which it is now proposed to abrogate, slavery cannot exist there for any length of time. The passage of the bill before us, then, would be equivalent to a direct prohibition of slavery in the Territory of New Mexico by an act of Congress; and that, too, in the face of the declaration contained in the second section of the organic act, that "the said Territory, or or any portion of the same, shall be received into the Union, with or without slavery, as their constitution may prescribe at the time of their admission." But this is not all. The passage of the bill would not only be an exercise of power on the part of Congress to exclude the peculiar property of the people of a portion of the States of the Union from the Territory of New Mexico, but, by interfering with the legislation of the Territory on the subject of contracts, it would also imply the assertion of a right in Congress to enter into the Territories of the United States with a view to regulate and control the municipal concerns of the people there by the exercise of legislative power under the Constitution. It is clear to our minds that no such powers exist in Congress, and we have no hesitation in saying that no such powers can be exercised by Congress without a palpable disregard of the rights of the people of the several States in the Territories of the United States, and without an open violation of the great principles on which our whole system of government is based: and this we will now proceed to show, by an examination of the different features of the Constitution of the United States, considered in connexion with the circumstances which gave it birth; by a reference to the position of the people of the several States with respect to the common possessions of the United States; and by the analysis and development of the relations existing between the government of the United States, and the Territories acquired under a constitutional exercise of its powers, by conquest or cession.

The several British colonies, upon their separation from the mother country in 1776, became, respectively, independent States, and each one was then as fully endowed with all the rights and attributes of sovereignty as any of the other nations of the world. The act which gave them independence, however, involved them in a long and burdensome war for the maintenance of their newly asserted rights, and the necessities of their position compelled them to enter into a league or compact among themselves, so as to enable them to combine all their separate means for carrying on that war against the common enemy, and to place them under the control and direction of a single head. This was effected by the "articles of confederation and perpetual

union," which received the assent of the thirteen States, acting in their separate capacities, and was signed by their duly accredited representatives or agents on the 9th day of July, 1778. The articles of confederation constituted, in truth, a treaty of momentous importance to the several parties to it, solemnly entered into by them, and which had the effect of forming or uniting them, as was stated in the instrument itself, "into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare," and binding them, in their separate, independent, and sovereign capacities, "to assist each other against all force offered to, or attacks made upon, them on account of religion, sovereignty, trade, or any other pretext whatever." The assent of the different States to these articles did not create a national government. There was no intent or desire on the part of the people of any of them, at that time, to create or establish such a government. This is evident from an examination of the various provisions of the instrument; but the fact was not left to inference. It was stated in so many words in the very first clause succeeding that giving the style of the confederacy, when it declared that "each State retains its sovereignty freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled."

At the time of the separation of the colonies from Great Britain there was a great extent of unoccupied territory embraced within the chartered limits of a number of them. This territory was won from Great Britain with the blood of the people of the several States who had made common cause against a common enemy; and it was insisted on by those of the States which had no unsettled lands within their limits, at a very early day after the successful termination of the war of independence, that the lands in the unoccupied territory should be regarded as the common property of the States united together in the carrying on of that war, and be disposed of for their common benefit. This claim on the part of these States was acceded to by the others, and these lands were voluntarily relinquished by the States having the legal titles to them, and transferred by deeds of cession to the several confederated States as their common property. The territory embracing these lands was of great extent, and as it was obvious that it was destined at no distant day to be filled by a numerous population whose presence there would alone give them value, the necessity of making suitable provision for giving to the settlers in the territory the advantages of a well-ordered government at once attracted the public attention, and the ordinance of 1787, "for the government of the territory of the United States northwest of the Ohio river," was the result.

This ordinance was framed with great care, with the view of providing for the progress of the communities then growing up in the territory from feeble beginnings until they became States and took their places as equals in the confederacy with the original States. The governments of the States to whose joint authority the ordinance owed its existence were founded on the consent of the people of the States, and it seems to have been the desire of the framers of the

ordinance to give to those inhabiting, and to inhabit, the territory, the benefit of the same principle in the temporary government which it created for them. The position of the people in the territory was peculiar. Their numbers were small; they were scattered over a vast region of country; and, as it appears from the language of the ordinance itself, with the exception of the settlers of the Kaskaskias, St. Vincent's, and the neighboring villages, they had no laws of any kind in force among them. In consequence of this want of all laws the ordinance first established a rule for the descent and distribution of the property of intestates, and provided for the disposition of property by last will and testament, and for its being transferred by contracts. These provisions, however, were not to operate upon "the settlers of the Kaskaskias, St. Vincent's, and the neighboring villages;" and were to continue in force only until the government created by the ordinance had exercised the legislative power vested in it. The ordinance then provided for the appointment of a governor, a secretary, and of a court to be composed of three judges, and gave to the governor and judges power to adopt and publish in the territory such laws of the original States, criminal and civil, as they thought necessary and best suited to the people, which were to be in force, unless disapproved of by Congress, until the organization of a general assembly, for which provision was made, when the territory should have five thousand male inhabitants. Upon the organization of such a general assembly, which was to consist of the governor, a legislative council, and a house of representatives, elected by the people, the legislative power was vested in it with "authority to make laws in all cases" not repugnant to the principles and articles in the ordinance "established and declared."

By the fifth article of the ordinance slavery or involuntary servitude was prohibited within the territory, and in some of the other articles various other restraints were imposed on the exercise of legislative power by the people of the territory whilst they remained in the territorial condition. These restraints imposed on them by the ordinance were beyond all doubt obligatory on the people of the territory, and their binding force continued until they passed from the territorial condition, under another provision of the ordinance, on attaining to a population of sixty thousand, and became entitled to admission into the confederacy "on an equal footing with the original States, in all respects whatever," because the territory belonged to the several States of the confederation, as their common property, and these States, which were absolutely free and independent, and possessed general legislative power over their possessions, had adopted the ordinance, acting each in its own sovereign capacity.

The league which had been entered into by the thirteen original States in 1778, by the adoption of the "articles of confederation and perpetual union," though it had enabled them to prosecute the war of independence to a successful termination, was soon found to be entirely inadequate to the proper management of the affairs in which all of the States were concerned in a time of peace. The several States were members of the league in their separate and sovereign capacities, and when the requisitions and ordinances of the "United States in Congress assembled"

were not voluntarily complied with or enforced by the States themselves, there was no mode of compelling action on their part. This evil at last became so great that the public attention in all of the States was awakened to the necessity of devising a new scheme of government for their common advantage, and a convention, composed of delegates from the several States, was called to determine upon one about the time of the adoption of the ordinance of 1787. This convention determined that the interests of the several States required the formation of a national government, to operate directly upon the people of the different States in their individual capacities and through the agency of its own officers; and then proceeded to frame the present Constitution, which, by the unanimous adoption of the several States through the direct action of their people, created the existing national government of the United States, and at the same time preserved the separate and independent existence of the several States, and left them in the full possession of their "sovereignty," and of every power, jurisdiction, and right "not conferred by them on the national government."

The new government was necessarily a government of limited, though sovereign powers, because the several State governments still continued to exist, and were in full possession of all their "sovereignty," and of "every power, jurisdiction, and right," not relinquished by them on the inauguration of the new government. This was an inevitable result of the formation of a national government to act for the benefit of a number of sovereign States, united under its authority, and which was to operate, in its appropriate sphere, within the limits of the several States and upon the persons of their people. But this was not left to inference by the States and the people of the States. Such was the jealousy of the exercise of any power on the part of the new government which had not been vested in it by express grant that it was declared, by an amendment to the Constitution, proposed by the first Congress meeting under its authority and ratified before 1791, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The powers of the new government were vested in three departments created by the Constitution itself, viz: the legislative, executive, and judicial; and the legislative powers which were vested in the Congress of the United States are defined with great exactness and precision in the instrument. Upon an examination of all of the clauses of the Constitution conferring legislative powers on the national government, it will be seen that there is but a single clause which confers any general legislative power. That clause is the eighteenth one contained in the eighth section of the first article, and gives power to the Congress, to use the words of the clause, "to exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." This grant of the power "to

exercise exclusive legislation in all cases whatsoever," though general in its terms, so as to embrace every species of legislative power, is yet limited and restrained in its operation by the very terms of the grant to "places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," and "to such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of Congress become the seat of the government of the United States;" and upon no rule or principle of construction can the exercise of this general power be extended beyond the established boundaries of the "places purchased with the consent of the legislature of the State in which the same shall be," for the purposes specified, and of the district of country, "not exceeding ten miles square," which may "become the seat of the government of the United States."

All the other legislative powers vested in the national government are conferred by special grants of power to be exercised over certain enumerated subjects of a general and national character and of public concernment, as contra-distinguished from those of a mere local or municipal description, and which are necessary for the regulation and control of the relations of men as members of civil society, which were all left in the possession of the State governments. Thus power over our relations with other countries; to declare war; to raise and support armies; to provide and maintain a navy; to establish post offices and post roads; to lay and collect taxes, duties, &c.; for raising a revenue for the government of the United States to enable it to pay the debts and provide for the common defence and general welfare of the United States; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, &c., &c., is vested in the national government by so many separate and distinct grants of specific powers: whilst, on the other hand, the States alone have the power to make all laws regulating the tenure and transfer or transmission of property by sale, exchange, descent, or devise, &c.; the form and effect of contracts; the relations of husband and wife; parent and child; master and servant; and the thousand other matters connected with the rights of property, the rights and duties of individuals as members of civil society, and growing out of the various occupations of men, and the multiplied relations of business.

The judicial power of the United States is also limited and restricted in its operation, though, like the legislative power vested in Congress, it is sovereign in its character when exercised by the courts in which it is vested, within the boundaries prescribed for it by the Constitution. This power extends to all cases arising under the Constitution, the laws of the United States, and treaties made under their authority; to cases affecting ambassadors, other public ministers, and consuls; to cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the

citizens thereof, and foreign States, citizens, or subjects; and beyond these enumerated cases it has always been holden by the judiciary itself, as well as by the other departments of the government, that it neither had nor could have any existence whatever.

But it is otherwise with the executive department of the government of the United States. The power vested in that department, though in most respects restrained, like the other powers conferred on the general government, within the limits of express grants, is in one instance general in its character, and extends to every subject properly within the scope of the sovereign power of an independent State. We allude, of course, to the power to be exercised in the management and control of those great interests which grow out of the relations of sovereign and independent States with each other, as members of the great family of nations. The government of the United States, in everything which concerns the relations of our people with foreign nations, is absolutely sovereign. One great object had in view in its formation was to provide for the successful termination, by contract or by force—that is to say, by treaty or war—of all those conflicts of interest which were certain to spring up between them and other independent States by the exercise of the whole power of the people of the several States under the direction of a single mind. With that design, the treaty-making power and the war-waging power, which are but portions of the executive power of a government, are vested by the Constitution in the President of the United States. The treaty-making power can be exerted by the President only with the concurrence of two-thirds of the Senate. The war-making power can only be exerted with the consent of Congress, as the Congress alone has the power to declare war; but after war is declared, the power of waging it is in the President. With these limitations, the executive department of the government of the United States possesses all the power to make treaties and to wage war which the executive of any national government can rightfully exercise under the law of nations. Both these powers are sovereign in their very nature, and are conferred on the President of the United States by the Constitution in their fullest extent. But this does not give him a right to exercise them at his mere will and pleasure. By the Constitution, the Congress of the United States has the power to make all laws "necessary and proper for carrrying into execution" all the various "powers vested by the Constitution in the government of the United States, or in any department or officer thereof;" and it therefore necessarily follows that the powers vested in the President to make treaties and to carry on war, are subjected to regulation and control by Congress, through the exercise of that power, and of various other powers specially conferred on that department of the government by the Constitution.

The third section of the fourth article of the Constitution declares that new States may be admitted into the Union by Congress. This is the only express grant of power to enlarge the limits of the United States which is contained in that instrument. Does it follow from this fact that the national government was left without power to acquire and hold additional territory in any other manner? We are of opinion that it does not. It is a settled principle of the law of nations

that every people have a right to hold any additional territory which has been voluntarily ceded to it by another people, or which it has obtained possession of by conquest in the prosecution of a necessary and just war. We before stated that the government of the United States in everything which concerns the relations of our people with foreign nations is absolutely sovereign. If this be so, then, as the treaty-making power and the war-making power have been conferred upon it by the Constitution in their utmost plenitude, it follows by necessary implication that the national government of the United States is as fully invested with the power to acquire territory by treaty or by conquest, in the settlement of disputes and controversies with other nations, as that of any of the other sovereign and independent States of the world.

But when either of these implied powers has been constitutionally exerted, and new territory has passed under the authority of the United States by voluntary cession or by the exercise of military force, then new and most important questions arise, viz: What is the position of this new territory? By what authority is it to be governed? And what are to be its future relations with the United States? In our opinion these questions can be best answered by recurring to the past action of our government with respect to territory thus situated, and by a brief development of the principles on which that action was based. Since the foundation of the national government the United States have had large accessions to their territory at different periods and under different circumstances, so that a practical solution to these questions has been given from time to time, as they were presented in their varying aspects, by the concurrent action of all of the departments of the government. Upon an examination into the conduct of the government with reference to the newly acquired territories, it will be found that it was always guided by the same principles; and as we are persuaded that the action taken by the government was, in every instance, in perfect consonance with the law of nations and the principles of the Constitution of the United States, we shall now proceed to give a rapid sketch of that action, beginning with the last instance of the acquisition of additional territory, viz: that resulting from our war with Mexico, because that places the whole subject under consideration more completely in view at one time than any other which has occurred in our history; and will afterwards notice that had in the other instances so far as is necessary to show that in every instance it was based on identically the same principles.

On the 13th of May, 1846, Congress declared that by the act of the republic of Mexico a state of war existed between that republic and the United States, and authorized the President "to employ the militia, naval, and military forces of the United States" to prosecute it to a speedy and successful termination. Under this authority the President of the United States, through whom alone the executive power of the national government can be constitutionally exercised, became entitled to wage war upon the republic of Mexico, to invade her territories, and subjugate her people, and to exercise over them, wherever subjugated by the military force of the United States, all the rights

which are conferred upon the conqueror by the laws of war. The naval forces of the United States were in consequence at once directed by the President to blockade the Mexican ports, and as soon as the necessary preparations could be made the territories of the Mexican republic were invaded at all points by our military forces. The progress of our arms was rapid, and in a very short period of time the power of Mexico was overthrown, and her entire territory in the military possession of the United States. Whilst the war was in progress the belligerent right of drawing supplies from the enemy without paying for them, and of exacting contributions for the support of the army, was everywhere exercised under the instructions of the President by our military and naval commanders in the territory occupied by our forces. After the whole of Mexico was in our possession, the President directed her ports to be opened to the trade of all nations, and such duties as he prescribed were levied and collected by the officers in our naval and military service, under his orders, for the use of the United States, upon the imports into the country; and measures were then taken by him to make the internal as well as the external revenues of the nation available to us, which were, happily, rendered unnecessary by a treaty of peace signed at Guadaloupe Hidalgo on the 2d day of February, 1848.

But this was not the only exercise of the executive power of the United States over the territory of Mexico whilst it was in our military possession. By the law of nations conquerers have the right to establish military or civil governments for the conquered territory, as they may deem necessary or convenient for the accomplishment of their designs. In our war with Mexico we did not contemplate the permanent conquest of the country. Our views were limited to obtaining redress for the wrongs she had done us, and an indemnity for our just demands against her. Owing to the internal condition of Mexico at the commencement of the war, it was certain she was unable to indemnify us for our demands by the payment of money, and we were therefore compelled to look forward to such an indemnity as it was in her power to offer; that is to say, by a cession of territory. For that reason, whilst we adopted no measures tending to the formation of a permanent government over the whole of Mexico, our course was different with respect to those portions of territory in our possession which were contiguous to the territories of the United States, and which it was thought might furnish the indemnity to which we had a just claim. Immediately after the declaration by Congress that war existed between the United States and Mexico, our military and naval forces were put in motion, with a view to the conquest of the provinces of New Mexico and California, and instructions were given to those in command, if the operations were successful, to establish temporary civil governments for the protection of the persons and property of their people, and for the preservation of quiet and order among them.

General Kearney, to whom was intrusted the command of the military forces destined to this service, was in full possession of the province of New Mexico early in September of the same year; and by orders dated on the 22d of that month, he established a temporary government, for the management of the local concerns of its people,

upon the model of our existing territorial governments, and having appointed all the officers necessary to put it into successful operation, continued his march towards California, for the purpose of carrying out the remainder of his instructions. But he had been preceded in the performance of this duty by other officers of the government. Instructions of the same tenor had been sent to our naval commanders in the Pacific on the breaking out of the war, and the province of California had been subdued by our arms early in August, and a new civil government was erected there by orders issued by Commodore Stockton, in the latter part of the same month, in his capacity of "Commander-in-chief of the United States forces in the Pacific ocean," &c., similar in character to that erected, under the same instructions, by General Kearney for the government of New Mexico.

The possession of portions of an enemy's country by an act of war imposes certain duties on a belligerent, during the continuance of that possession, with respect to the peaceful inhabitants who are thus placed under its dominion; and it was the intention of the United States to perform all of those duties towards the inhabitants of California and New Mexico, by the creation of temporary governments of such a character as would secure to them the enjoyment of their civil rights, and the maintenance of public order. But this was not the only object of our government. When the invasion of Mexico was decided on, the government of the United States determined to prosecute the war with a view to obtain a territorial indemnity for our claims against her, and for the wrongs she had inflicted on us by an unjust attack upon our people. This is at once apparent from the instructions issued to General Kearney from the War Department, dated June 3, 1846. In these instructions the Secretary of War says: "Should you conquer and take possession of New Mexico and Upper California, you will establish temporary civil governments therein—abolishing all arbitrary restrictions that may exist—so far as it may be done with safety." And the Secretary further tells him, he "may assure the people of those provinces that it is the wish and design of the United States to provide for them a free government, with the least possible delay, similar to that which exists in our Territories," and that "they will then be called on to exercise the rights of freemen, in electing their own representatives to the territorial legislature." In obedience to these instructions, General Kearney, in a proclamation to the inhabitants of New Mexico, issued immediately after taking possession of that province or department, announced that "it was his intention to hold the department, with its present boundaries, (on both sides of the Del Norte,) as a part of the United States, and under the name of 'the Territory of New Mexico;'" and declared that "all persons residing within the boundaries of New Mexico" were absolved "from any further allegiance to the republic of Mexico, and were claimed by him as citizens of the United States." An announcement to nearly the same effect was also made to the inhabitants of California by Commodore Stockton, who acted under instructions of the same description.

The governments organized by General Kearney and Commodore Stockton, respectively, were in substance alike; the laws in existence at the time of the conquest were continued in force until changed by

competent authority ; the municipal officers of cities, towns, departments, and districts, were retained in the performance of their proper functions, and provision was made for replacing them with others by popular elections. A governor, and other officers, for the performance of the executive duties of the new governments, were appointed by the officers in command, who were to hold their offices at the pleasure of the President. In California legislative power was vested in the governor and a legislative council ; the members of the first legislative council were to be appointed by the governor for a certain term, and after the expiration of that term their successors were to be elected annually by the people ; and the power of the legislative council thus created was declared to "extend to all rightful subjects of legislation." In New Mexico legislative power was vested in a general assembly, to consist of a legislative council and a house of representatives, to be chosen by the inhabitants of the several counties and districts, and their general assembly was to "have power to make laws in all cases, both civil and criminal, for the good government of the people, not inconsistent with or repugnant to the Constitution and laws of the United States;" in both Territories an absolute veto upon the passage of laws was given to the governor. Some of the provisions embodied in the instruments framed for the establishment and organization of these governments proposed to confer political rights under the Constitution of the United States on the people of the conquered territories ; such rights could only be conferred on them by the action of Congress, and in consequence the President disapproved of all such provisions when those instruments were communicated to him, and instructed the different officers in authority in those Territories not to carry such portions of them into effect. In all other respects the measures adopted for the temporary government of the Territories were approved, and more especially so far as they permitted their inhabitants to participate in the selection of agents to make or execute the laws to be enforced among them, as will be seen by reference to the despatches from the War and Navy Departments to General Kearney and Commodore Stockton, respectively, dated on the 11th of January, 1847.

The instructions given to our naval and military commanders, and the measures adopted by them for carrying these instructions into effect by the establishment of temporary governments over New Mexico and California, were laid before Congress on the 22d of December, 1846, by the President, in answer to a resolution of the House of Representatives of the 15th of the same month ; and in his message accompanying these various documents he declared his approval of them, with the exceptions already referred to. The temporary governments thus created and organized, and carried on under the executive authority of the United States, continued to exist and perform all the functions of rightful governments for the security of our conquests, for the preservation of public order, and for the protection of the rights and the promotion of the interests of the inhabitants of those Territories, until the war with Mexico was terminated by a treaty of peace, signed at Guadalupe Hidalgo, on the 2d day of February, 1848.

By the terms of this treaty the Territories of New Mexico and Cali-

fornia were ceded to the United States; and the President, in his message of July 6, 1848, communicating the treaty to Congress after it had been ratified by him, by and with the advice and consent of the Senate, and ratifications had been exchanged with Mexico at Queretaro on the 30th of May preceding, called attention to this fact, and urged upon Congress the propriety of immediate action on their part for the establishment of territorial government, and the extension of our laws over those possessions. Owing to the operation of causes to which it is unnecessary to allude, Congress did not act on this suggestion of the President at that session, nor for some time afterwards. By an act approved March 3, 1849, the revenue laws of the United States were extended over California, and it was erected into a collection district; but inasmuch as no United States courts were in existence there, it was provided in the act that all violations of those laws, committed within the new collection district, should be prosecuted in the district court of Louisiana, or the supreme court of Oregon, "as if such cases had arisen in the district or Territory where the prosecution" was brought. With this exception, Congress took no action whatever with respect to the newly acquired Territories until the 9th day of September, 1850, when California was admitted into the Union as a State, and the existing territorial government of New Mexico was created by their authority, and the Constitution and all the laws of the United States which were not locally inapplicable were declared to "have the same force and effect within the said Territory of New Mexico as elsewhere within the United States." And it was not until the 28th of the same month that "all the laws of the United States not locally inapplicable" were, by act of Congress approved on that day, extended over California.

From this recital of facts it appears that temporary governments, formed and established by the President in the exercise of the executive power of the United States vested in him by the Constitution, without the aid or intervention of Congress, were in existence over the Territories of New Mexico and California, not only during the continuance of the war in which they were conquered, but for upwards of two years after the close of that war, and whilst they were no longer holden by us as conquests, but as possessions belonging to us under a voluntary transfer from their former owners, made to the United States by a treaty of cession. And this question then presents itself: What is the source or foundation, under our system of government, of the power to establish and maintain temporary governments over Territories acquired by the United States since the formation of our national Constitution.

The power, most certainly, is not conferred by that clause of the Constitution which declares that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." This is evident from the following, among other circumstances connected with that clause. First. The terms and plain signification of the words of the whole provision, indicate that territory to be transferred as property, and with reference to its pecuniary value alone, was the object with respect to which the power "to dispose of and make all needful rules

and regulations respecting," &c., was given, and that it could in no sense be applicable to, or be made to operate upon population with a view to their government. And second. It could not have been intended to provide for the creation of governments over the Territories without the limits of the organized States, because that had been already provided for in the ordinance of 1787, adopted by the several States, acting in their separate capacities as independent sovereignties, just before the formation of the Constitution, and such a provision was therefore unnecessary. Nor is the power conferred by any of the special grants made to Congress, or to any other department of the national government in the Constitution. That is apparent, at once, from the slightest examination of the various provisions of that instrument. From what portions of the instrument, then, it may be asked, is the power derived? To our minds the answer to this question is clear. It is derived from the general grant of the executive power of a national government, which is embodied in the Constitution.

We before stated that this power, though in most respects restrained, like the other powers conferred on the general government, within the limits of express grants, is general in its character, so far as it relates to the management and control of those great interests which grow out of the relations of sovereign and independent States with each other as members of the great family of nations, and that it extends to every subject connected with those interests which are properly within the scope of the sovereign power of an independent State. It was by the exercise of this power, under the law of nations, that the temporary governments, necessary to secure our conquests, and to fulfil the duties imposed on us towards their inhabitants during the war with Mexico, were established by the President. It was by the exercise of this power that the governments thus established by the President were maintained and carried on after the termination of that war, and until Congress, by its own action, changed the relations of the Territories over which they operated to the United States, by admitting California into the Union as a State, and organizing a new government for the Territory of New Mexico. And it is through the exercise of the power "to make all laws necessary and proper for carrying into execution" the executive power of the government, which is conferred on it by the last clause of the 8th section of the 1st article of the Constitution, that Congress derived its authority to establish the new territorial government for New Mexico, enacted by the act approved September 9, 1850.

The creation of a government for a territorial dependency is an act of sovereignty, which it has been the usage among nations in all ages of the world to perform through the agency of the executive departments of their respective governments when a necessity for it has arisen. This is shown by all history, and it cannot be necessary to refer to particular instances in support of the position. The executive power of our national government, it is declared in the Constitution, is "vested in a President of the United States of America." But this declaration does not give that great officer the whole executive power of the national government, and enable him to exercise it at his pleasure. A large portion of the executive power of the government

of the United States is dependent upon the action of Congress for its exercise, because the power "to make all laws which shall be necessary and proper to carry into execution" the "executive power" "vested in the President," as well as all other powers vested "in the government of the United States, or any department or officer thereof," is specially conferred upon it by the Constitution. Another portion of this power, however, may be exerted without any action of Congress, when there is a necessity for it; as, for instance, the power to create and maintain a temporary government over a newly acquired territory.

Congress, it is true, in virtue of the power conferred on it by the Constitution, to make all laws necessary and proper to carry into execution the executive power of the United States, has an unquestionable right to create and maintain temporary governments over the territories which are acquired by conquest, whilst the war in which the conquest is made continues, as well as after its termination. But if Congress fails at any time to exercise this power, the executive power vested in the President by the Constitution must necessarily be exerted by him for the creation and maintenance of such governments over Territories so situated, whenever they are required for the promotion of the interests of the United States, or for the protection of the inhabitants of the Territories in the enjoyment of their just rights under the law of nations. This power, as we have already seen, was so exercised by the President over the Territories which had passed under the dominion of the United States, in the proclamation of the war against Mexico, with the entire approbation of Congress and of the whole American people. And the government created for California by such an exercise of power by him has been decided to be a rightful government after the termination of the war, and so long as it was left in existence by Congress, by the highest judicial tribunal of the United States, in a suit between individuals, in which the validity of the acts of an officer exercising authority under it was contested so as to put the whole question directly at issue.

"The President, as constitutional commander-in-chief of the army," say the court in that case, "authorized the military and naval commanders of the United States forces in California to exercise the belligerent rights of a conqueror and to form a civil and military government for the conquered Territory." "The formation of the civil government in California, when it was done, was the lawful exercise of a belligerent right over the conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease as a matter of course, or as a consequence of the restoration of peace; and it was rightfully continued after," &c., "until Congress legislated otherwise."

Whenever there is a necessity for the organization of a temporary government over a Territory of the United States, and the power of Congress is exerted for its creation and establishment, that exercise of power is an act of sovereignty on the part of the United States, performed by Congress, under the Constitution, and which can be performed and carried into effect only through the instrumentality of the executive power vested in the national government. The act itself is

not an act of legislation in the proper sense of that term. A legislative act, in the usual acceptation of the phrase, is a rule established by the law-maker for the guidance of the actions of men, and for the regulation of their rights with respect to each other, as members of civil society, which is to operate on them directly in their individual capacities. A law of Congress creating a territorial government has nothing in common with such an act. It does not operate on persons in their relations with each other, or with the government of the United States as individuals, but upon men as aggregated together and constituting a political community. The action of Congress in its enactment is of the character of that of the people of a State when they adopt a constitution for their own government. It confers political rights upon the community, defines their nature, and fixes their extent, and prescribes the manner in which they are to be exercised. The power to make such a law is not specially conferred on Congress by any express provision of the Constitution. It can be derived, by no violence of construction, from any one of the specific grants of power made to it in that instrument. It is the result alone of the power to make all laws necessary and proper to carry into execution the executive power of the United States, which is conferred on Congress in the last clause of the eighth section of the first article of the Constitution; and, as the whole executive power of the United States is vested in the President by the second article of the Constitution, it necessarily follows that Congress can organize a territorial government only by the regulation and control of the executive power of the national government through the agency of the presidential office in which that power is vested.

The executive power vested in the "President of the United States of America" is ample for the formation of temporary governments over newly-acquired territories, when a necessity exists for forming such governments, and no action has been taken on the subject by Congress. Without such power in the Chief Magistrate it is manifest, from our past experience, that the public interest and the interests of the inhabitants of our newly-acquired Territories might be at times exposed to serious injury. But the occasions for the independent exercise of this power by the President will be of very rare occurrence under the ordinary operation of our political system. The instances of New Mexico and California are as yet the only ones, and it is obvious, from the constitutional relations existing between the executive power and Congress, that it will never be so exercised unless in cases of grave exigency. It will be seen, however, from the slightest examination into the action of Congress in the organization of new territorial governments, that the creation of a government is not the result of an original power vested in Congress, but of the exercise of a power conferred on it which is auxiliary to the executive power vested in the President. It is not necessary for our purpose to refer to all the acts of Congress of this description. We shall only mention some of the earlier ones which furnish a distinct illustration of the view just presented.

We have already stated that provision was made by the ordinance of 1787, adopted by the States in their sovereign capacities, before

the formation of the Constitution of the United States, for the temporary government of the territory of the United States northwest of the Ohio river. The Territories south of the Ohio river, which are now included within the boundaries of the States of Kentucky and Tennessee, never had any territorial governments established over them; they were embraced in the chartered limits of Virginia and North Carolina, and were respectively severed from the States to which they belonged, with the consent of those States, and admitted into the Union as new States, without passing through a territorial condition under the authority of the United States. The first original exercise of power by the United States for the organization of a temporary government over a territorial possession was in reference to what was known as the "Mississippi Territory," lying south of the State of Tennessee, and which now constitutes the States of Mississippi and Alabama. The act of Congress for this purpose, approved April 7, 1798, simply declared that "the President of the United States is hereby authorized to establish therein a government in all respects similar to that now exercised in the territory northwest of the Ohio river, excepting and excluding the last article of the ordinance made for the government thereof by the late Congress," &c. This act, it will be seen, is nothing more or less than an exercise of the sovereignty of the United States by a law for carrying it into execution through the executive power of the United States vested in the President, in the manner Congress saw fit to prescribe; and when the people of the western part of this Territory were authorized to form a constitution for their own government, with a view to the admission of that portion of the Territory into the Union as a State, the act of Congress providing for the continuation of the then existing Territorial government over the remaining parts of the territory, by the name of "Alabama," was of the same character. It declared that the offices in existence, and the laws then in force, in that portion of the Territory not embraced in the contemplated new State, should "continue to exist and be in force until otherwise provided by law," and provided for the appointment of a governor and secretary by the President, and for the organization of a legislature, by the authority of the governor, immediately after this appointment, with the same powers as were possessed by the legislature of the Mississippi Territory; and when, in the opinion of Congress in 1800, it was expedient to have new temporary governments over different portions of the northwestern territory, with a view to carrying into effect the provisions of the ordinance of 1787, for the formation of States, the action of Congress differed in nothing from that adopted before with reference to the government of the Mississippi Territory.

The first accessions to our national territory were obtained by treaty. France, by a voluntary transfer, ceded the province of Louisiana to us by the treaty of Paris, on the 30th of April, 1803; and Spain, also, by a voluntary transfer, by the treaty made at Washington on the 22d of February, 1819, ceded to us the provinces of East and West Florida. In each of these treaties it was expressly stipulated that the inhabitants of the ceded territory should "be incorporated in the Union of the United States, and admitted as soon as possible, according

to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.

Soon after the ratifications of the treaty of Paris were exchanged, Congress, by an act approved October 31, 1803, authorized the President to take possession of, and occupy, the territory ceded by France to the United States, and to employ any part of the army and navy of the United States, &c., for that purpose, and in order to maintain our authority there; and declared that, "until the expiration of the present session of Congress," unless provisions for the temporary government of the said territories be sooner made by Congress, all the military, civil, and judicial powers, exercised by the officers of the existing government of the same, shall be vested in such person and persons, and shall be exercised in such manner as the President of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion. On the 26th of March following, 1804, an act was passed erecting Louisiana into two Territories, and providing for their temporary government. The southern part of the province was constituted a Territory of the United States by the name of the Territory of Orleans. The laws in force there at that time, and not inconsistent with the act, it provided, should continue in force until altered, modified, or repealed by the legislature. The executive power of the new government was vested in a governor, to be appointed to hold office at the pleasure of the President. A secretary of the Territory was also to be appointed, and to hold office, by the same tenure; and it was declared that the legislative power should "be vested in the governor, and in thirteen of the most discreet persons of the Territory, to be called the legislative council, who shall be appointed annually by the President;" and that the legislative power thus vested should be competent "to alter, modify, or repeal, the laws" then in force, and should also "extend to all the rightful subjects of legislation," with the proviso that no law should be valid which was inconsistent with the Constitution and laws of the United States, or which should lay any person under restraint, burden, or disability, on account of his religious opinion, profession, or worship. The residue, or northern portion of the province of Louisiana, was called the district of Louisiana, and the power to provide for its temporary government, by making laws, establishing courts, &c., was vested in the governor and judges of the Indiana Territory, under the same restrictions as to the exercise of the legislative power previously imposed on the legislative power granted to the governor and legislative council of the Territory of Orleans.

The provinces of East and West Florida, as we before mentioned, were ceded to the United States on the 22d of February, 1819. On the 3d of March, 1819, Congress, by act approved on that day, authorized the President to take possession of the ceded territory and provide for its temporary government in the same manner as had been before done with respect to Louisiana. No possession seems to have been taken of the Floridas under this act; and, on the 3d of March, 1821, a similar act was again passed, under which the Floridas were taken pos-

session of, and a temporary government over them was organized and maintained by the President until March 30, 1822, when provision was made by Congress for a new government, resembling in all respects that established in 1804 for the Territory of Orleans.

It will be found, on comparison, that the temporary governments of Louisiana and Florida, formed by acts of Congress, were almost identical in character with those established in California and New Mexico, by an independent exercise of the executive power of the United States by the President. The only substantial difference between them consisted in this: In the cases of New Mexico and California provision was made for the exercise of legislative power by representatives elected by the inhabitants; and various other public functions were to be performed by agents chosen by the people. But this was not so in Louisiana or Florida. All the persons engaged in the administration of their respective governments were appointed by the President of the United States, or by the governor appointed by him. And it is for that reason that a distinguished jurist, in a recent opinion delivered in a case which has attracted the attention of the whole American people, has said that "the territorial government of Louisiana was an imperial one."

When the various acts of Congress providing for the organization of temporary governments in the Territories of the United States which were passed before 1820 are analyzed, it is plain they were all founded on the same principle.

The act of creating or establishing a government is an exercise of political power, as it is termed, in contradistinction to the civil power; and the acts of Congress, accordingly, so far as they form or establish governments, make grants of political power to the communities over which the governments are to operate, and create the official organization through which the political power granted is to be exercised. Thus these acts establish the various offices which are thought requisite for the management of the public business of each community, and provide how they are to be filled. They create an executive—a body for the exercise of the legislative power—and a judiciary to decide upon and enforce the rights of individuals under the laws in force among them. But these acts furnish no instance of the exercise of any civil power of legislation, of a local or municipal nature, by Congress, over the inhabitants of a Territory. The first instance in our history, in which such a power was asserted and exercised by Congress, under our existing Constitution, occurred in 1820, when, in the act providing for the admission of the State of Missouri into the Union, it was declared that in all the territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, and not included within the limits of Missouri, "slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby prohibited."

All must be familiar with the circumstances under which this new exercise of power by the general government took place. For the first time in our existence as a nation, the lust of power impelled ambitious men in our councils to attempt the formation of a sectional

party, when the people of the Territory of Missouri applied for admission into the Union as a State, by arraying the people of the northern non-slaveholding States against those of the south in which African slavery was a permanent domestic institution. Unmindful of the fact that the Constitution, and the whole public action of the States united in the confederacy prior to its formation, contemplated that new States, upon their admission into the Union, were to have the same rights of sovereignty, freedom, and independence as the old, these men insisted that Missouri should not be admitted into the Union as a State, unless her people would submit to the enfranchisement of their slaves as a condition precedent to their admission. It is not easy to conceive of anything more completely in conflict with the principles of the Constitution, or more violative of the right of a people to self-government, than the pretension then set up. But wrong and unfounded as it was, it united nearly all of the representatives of the non-slaveholding States in its support, and gave rise to a contest which threatened the overthrow of the government. In the midst of a conflict which menaced our very existence as a nation, it was proposed that the restriction attempted upon Missouri should be waived, and that, in place of it, slavery and involuntary servitude should be prohibited in the Territories of the United States lying west of the Mississippi river and north of thirty-six degrees and thirty minutes north latitude. This proposition was acceded to by a majority of both houses of Congress. And thus whilst the full fury of the storm, which an attempt to impose an unconstitutional condition upon a new State had excited, was upon them, Congress, by its action, placed an unconstitutional restriction on the people of a portion of our Territories upon the statute-book in the 8th section of the act, approved March 6, 1820, providing for the admission of Missouri into the Union.

Can any one acquainted with our system of government doubt the unconstitutionality of the prohibition contained in that section of the Missouri act? We cannot believe it. Slavery, or that relation between men by which one owes personal service to another, has existed in every age of the world. African slavery has existed in modern times, by the authority of every civilized State which has had colonial possessions. It was established and maintained in the North American colonies by English influence and English power. It was an existing institution in all of the States which took part in the struggle against the British crown for independence, in 1776. It was an existing institution in all of the States but one, when the Constitution under which we now live was formed; and it is recognized in various provisions of that great instrument, as a rightful institution among the American people, subsisting by municipal authority, wherever it is their will and pleasure to have it; and, by that very fact, is placed as absolutely beyond the reach and control of the federal government as though it existed in a foreign State. The federal government, as we have before said, was formed for the accomplishment of certain great national objects. No power of general or municipal legislation whatever is given to it, except with reference to "such district (not exceeding ten miles square) as may, by cession of particular States,

and the acceptance of Congress, become the seat of government of the United States," and to such places as may be purchased "for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." With that exception the federal government has no authority over the local or municipal concerns of the American people, whether in the States or the Territories of the United States; and Congress can no more legislate to exclude slavery from a Territory, or to establish it in it, than it can in a State. The want of legislative power in Congress over the whole subject, in the Territories as well as the States, is absolute, because it is one of local or municipal concern, and no legislative power whatever, of that nature, has been given to Congress by the Constitution. To see this, it is only necessary to examine its various provisions. The fact that it was so, was impressed upon the people when they were called on to vote for its adoption, for they were assured by those who had taken a chief part in its formation, "that the jurisdiction of the federal government is limited to certain enumerated objects which concern all members of the republic," and "that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere." And that it has always been so regarded by the American people is evident, because, since the foundation of the government to the present day, there has been no instance in which Congress has attempted to exercise a power of local or municipal legislation in the Territories of the United States, except under the pressure of a sectional feeling for the prohibition of slavery, by the provision contained in the Missouri act, or by the adoption of the Wilmot proviso, of late years, in territorial acts, until this House acted in that direction, during the present session, with reference to the Territory of Utah.

Whether the newly acquired territory of a sovereign State passes under its dominion by conquest or by voluntary cession from its former owner, without any previous war, can make no possible difference in its position, under the law of nations, with respect to the new sovereign. The effect of the transfer, whether it be the result of the employment of military force, or consent, is precisely the same upon the territory, for in either case the authority of the former sovereign is at an end, and gives place to that of the new one; and the authority of the new sovereign over it is precisely the same, unless it has been specially restrained by the stipulations contained in the treaty when it has been acquired by voluntary cession. It is a settled principle of the law of nations that on such a transfer of territory the relations of the inhabitants with each other undergo no change. The local or municipal laws which determine the rights and duties of persons, and regulate their intercourse and general conduct with respect to each other in civil life, continue in force until altered by or with the consent of the new sovereign. The relations of the inhabitants with their former sovereign, and the government which has acquired their territory, alone are changed. The same act which transfers their country transfers the allegiance of those who remain in it, so that what may be properly denominated the political law, operating over the entire

community in their collective capacity as a people, is necessarily superseded by that of the new sovereign, while the laws of a civil nature, operating upon individuals, remain undisturbed.

After the transfer of a country has been made, the new sovereign, by the usage of nations, has a perfect right to remodel its political institutions as it may see fit; and in the exercise of that right it is competent for it to confer upon the people such political rights as it may deem proper or expedient, or to withhold them altogether, and retain them to be exercised by itself. But whilst this is true as a general proposition under the public law of the world, the exercise of the right of the new sovereign is necessarily controlled by the constitutional principles of the government through which the right of sovereignty is to be exerted. If the government of the new sovereign be one invested with general and unlimited legislative power, it may itself exercise all the powers of political and civil government over it by legislating directly for the regulation of the concerns of the people of a local or municipal character, as well as of any other. This is the case with respect to the government of Great Britain. Though in the ordinary course of government Parliament does not directly legislate for the colonies, yet the general legislative power of Parliament over all possible subjects of legislation extends not only throughout the united kingdom, but over all its colonies and foreign possessions; because, to use the language of the greatest of the writers on English law, "the power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds;" and "it can change and create afresh even the constitution of the kingdom and of Parliament themselves;" and "can, in short, do everything that is not naturally impossible," &c. It is otherwise, however, with the government of the United States. There is no general and unlimited legislative power in Congress. The legislative power of the federal government is limited to particular subjects. It was conferred by special and well-defined grants for certain enumerated purposes of national concern, and does not extend to any subject whatever of a local or municipal character; and it is therefore obvious that while the government of the United States may acquire new territories by conquest or treaty like other nations, by the exercise of the executive power vested in it, it is nevertheless without the power to govern them in the same manner.

When that power has been exerted in a just war, so that additional territories are brought under our authority, such territories constitute a possession of the sovereignty of the United States. The national government, however, in the exercise of the sovereign power vested in it, is but a trustee, under the Constitution, for the people of the several States, in their respective capacities as separate and distinct sovereignties, and it, therefore, necessarily follows that the new possession is acquired for their common advantage and benefit, and must be so holden while it remains in that position. Such a possession is, in truth, the common property, politically speaking, of the several States composing the federal Union, and, the States being equal under the Constitution, their respective citizens have equal rights in it, and as citizens of their respective States, like the joint owners of any other

property held in common, they have full liberty to enter it, with all the rights appertaining to them in their own States, and to be protected while there in the enjoyment of these rights by the federal authority so long as the undivided sovereignty of the United States is over them.

That a citizen should carry with him the rights secured to him by the laws of his country wherever he goes, when no barrier is opposed to them by a conflicting jurisdiction, is no new pretension. Among the Grecian republics those who went abroad to establish colonies carried with them to their new homes all the institutions of their respective countries. When English subjects establish themselves in an unoccupied country, it is the settled doctrine in England that the laws then in being, and which are the birthright of every Englishman, are immediately there in force. Nor is there any difference in this respect between a conquered and an unoccupied country. In a conquered country, just as in an unoccupied one, there are no conflicting laws in the way of a conquering people. They have full possession of all the branches of the public administration, and, as there are no laws in existence but such as they choose to enforce, when they enter the country with the property, no matter of what description, recognized by their own laws, that property is entitled to the same protection from the national authority exerted there which it before enjoyed at home.

Although slavery does not exist in all of the States, it is recognized as a rightful institution under our governmental system, wherever citizens of the United States, forming distinct political communities, may see fit to maintain it. Slaves, as persons, enter, as an element, into the apportionment of the representation of the States in Congress, and in the apportionment of direct taxes among the States; and as property, those holding them are protected in their rights to them by a provision for their being delivered up to their owners when they escape into another State, and by a prohibition on such State from discharging them from service or labor, by any law or regulation of its own. Our situation as a people is, in one respect, peculiar. We have no law of property common to the whole United States. Each State makes that law for itself, within its own limits, and as the States are equals, under the Constitution, the rights of property, resulting from these laws of the several States, must be of equal validity and effect wherever the sovereignty of the United States alone exists and gives protection. Under these circumstances, every citizen of the United States who goes into a conquered territory with his slaves, which were rightfully holden by him as property under the law of the State from which he removes, is as much entitled to be protected in the possession of that species of property by the national authority, as any other citizen from a non-slaveholding State can be, to be protected in the possession of other species of property. And this consequence cannot be prevented, by the fact, that the laws of the country, before the conquest, prohibited slavery. The fact of conquest at once abrogates all the political laws of the country, and such of the civil laws as would be injurious to our own citizens, or would prevent the exercise or enjoyment by them of any of their rights, whilst in the conquered ter-

ritory. And this is precisely what took place in the territories conquered by our arms in the war with Mexico. Many officers in the public service carried their slaves with them in the war of invasion, and held them wherever they went, under the public authority. After the conquest of New Mexico was complete and a civil government had been organized there by the executive authority of the United States, considerable numbers of the citizens of slaveholding States went into the territory to establish themselves, accompanied by their slaves, and were fully protected in the enjoyment of that species of property by the action of the new government.

The government of the United States is founded on the consent of the people, and its policy towards other nations is one of peace. When we engage in war it is only in self-defence, or in vindication of our just rights and of the national honor. The federal government possesses none but delegated powers, and there is certainly no power given to it by the Constitution "to establish or maintain colonies bordering on the United States, or at a distance, to be ruled and governed at its own pleasure." Nor is there any power given to it "to enlarge its territorial limits in any way except by the admission of new States." Under such a frame of government it is evident that no conquest can be long held as a mere dependency, subject to the external rights of sovereignty vested in the national government, and which can only be exercised through the instrumentality of the executive power vested in it, because to do so "would be inconsistent with its own existence in its present form." A possession of territory by conquest is in its very nature precarious and temporary. At the conclusion of the war two courses, in regard to such a territory, are alone open to us. We may relinquish its possession on such terms and conditions as justice and propriety seem to warrant, so that it will pass again under the dominion of its former possessor; or we may retain it, with a view to its incorporation into the Federal Union under the Constitution, with the consent of its inhabitants. We adopted the latter course in the case of New Mexico, and acquired a permanent title to it by a treaty of cession, after a contest of arms, as we had before acquired a permanent title to Louisiana and Florida by treaties of cession after contests of diplomacy.

But the obligation imposed on the American people by the principles of the national Constitution, to extend the advantages of self-government to the inhabitants of New Mexico, was not left to mere inference at the time of the cession. In the treaty making the cession, as in the treaties ceding Louisiana and Florida to the United States, it was solemnly stipulated that the inhabitants who chose to remain in the territory should acquire the rights of citizens of the United States, and should "be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution," &c. The treaty of cession changed in no respect the relation between the Territory of New Mexico and the government of the United States. Its only real effect was to convert a temporary possession of the territory into a permanent one, and to authorize us

to look forward to its admission into the Union as a new State, when it had the necessary population.

Whilst a territory is in a state of pupilage, prior to admission into the Union, the Congress of the United States, though absolutely without power to legislate upon subjects of a local or municipal character for the regulation of the rights of property and of the relations among men as members of civil society, has an unquestionable right whilst in the exercise of the sovereignty of the United States for the organization of a temporary government over it, to use its discretion in granting larger or more limited political powers to the government, or to the people of the territory. The extent of the powers granted, and how, and by whom they shall be exercised, are questions of mere expediency which must be decided with reference to the necessities, position, and character of the people. If the laws in force in the territories, when the new government is created, are suited to its condition, and the state of pupilage is to be short, the territory might be safely left without any legislative power. The failure to exercise legislative power for two years is not productive of any inconvenience in ordinary times, as we see continually in practice in those States where there are only biennial sessions of the legislature. If, on the other hand, legislative power in the government is thought necessary to modify existing laws, or to enact new ones, as the changed or changing circumstances of the inhabitants may require, the power conferred may be limited to certain specified subjects—or certain subjects may be excepted from its operation—or, as is most usual, a general legislative power may be given to it, subject only to the limitation imposed by the prohibitions contained in the Constitution of the United States, or to the restrictions embodied in the organic act; and the power thus accorded may be exercised, as Congress in its wisdom may direct, by a legislative body appointed directly by the President, as was the case with respect to the territorial governments organized by Congress for Louisiana and Florida; or by a general assembly composed of representatives chosen by the people by regular elections, as provided for in most of the acts creating such governments.

When Congress was about to proceed to the formation of a new territorial government for New Mexico, in 1850, there was a rightful government in existence there which had been established by the United States before the cession; and under the authority of that government, the laws of Mexico recognizing the system of peonage were continued in force, and our citizens who had gone into the territory from slaveholding States with their slaves were protected in their possession and enjoyment of them as property. This was the existing condition of things when New Mexico was ceded to the United States in 1848; and that condition was unchanged when Congress provided a new territorial government for it by the act approved September 9, 1850. By this act a legislative assembly for the Territory was organized to consist of a Council and a House of Representatives, the members of which were to be elected by the people, after an apportionment of them respectively among the several counties and election districts of the Territory; and all the township, district, and county officers, not

otherwise provided for in the act, were to be appointed or elected in such manner as the legislative assembly might direct. And, as we have before stated, the legislative power conferred on the territorial government was to extend to "all rightful subjects of legislation consistent with the Constitution of the United States and the provisions" of the act itself; and all the laws passed by the legislative assembly were required to be submitted to Congress, to which was reserved the right of disapproving them and making them "null and of no effect."

By the laws of Mexico persons are permitted to enter into contracts with others by which they bind themselves to labor in their service, and for their advantage, at a certain rate of wages, for a stipulated period of time, or until they have repaid the sums of money advanced them; and the courts are clothed with the powers necessary to enforce a specific performance of all such contracts. Those who bind themselves to labor in the service of others under such contracts are known as peons, and the permission given to persons to enter into the contracts and bind themselves legally to the performance of the labor stipulated, and the authority vested in the courts to compel those binding themselves to labor in fulfilment of the obligation imposed on them by the contracts, constitute what is known as the system of peonnage. This system was, at the time of the passage of the act creating the new territorial government in 1850, and is now, in existence in New Mexico, under the former laws of the country which have been continued in force ever since it was first taken possession of by the United States.

A right on the part of one to whom labor or service is due as a peon, to correct the person owing the labor or service, in a reasonable manner, for neglect of his duties, is a necessary incident to a contract giving right to such labor or service. But this right of correction is not peculiar to the system of peonnage. It is recognized under "the common law" as a necessary incident of the relation of master and servant which is now and always has been an authorized and established relation between man and man, wherever that system of law has prevailed. If any one will take the trouble to look into Bacon's Abridgement, under the title or head of "master and servant," he will discover this. In that work, as well as in every other English work on the same subject, it is laid down as elementary under "the common law," that "a servant may hire himself for what time he pleases," and that the relationship which grows out of the contract between the servant and master, gives to the master on the one hand "superiority and power," and imposes on the servant "duty, subjection, and, as it were, allegiance on the other." But this is not all. It is stated in the same work that "It is clearly agreed that a master may correct and punish his servant for abusive language, neglect of duty," &c., and that in an action of assault and battery brought by his servant against him, he may justify that he was his servant, gave him provoking language, neglected his duty," &c., and that therefore *moderate castigavit, i. e.*, he chastised him moderately; and on the issue of *immoderate castigavit*, "if it appears in evidence that the punishment was such as is usual for masters to give to their ser-

vants, the master will be acquitted." And so it is with masters in regard to apprentices. "A master," it is stated in Bacon, "may correct his apprentice for disobedience and improper conduct." But such correction must be moderate. And this is now, most certainly, the law in philanthropic England; and we believe it to be the law at this time in most of the northern States of the Union in which the common law enters into and makes a part of their system of law.

The act of the legislative assembly of New Mexico, approved January 26, 1859, which the bill referred to us proposes to repeal, is unquestionably designed to prevent vexatious suits against masters by their servants, or peons, in cases where the correction given them has been reasonable and "moderate," and such as it is "usual," to use the language of the English common law, for masters to give their servants. This is evident on reading the act; for the jurisdiction of the courts is left entirely unimpaired when the "correction" given is inflicted in a cruel or unusual manner. The right in Congress to disapprove of this act, and of the act "to provide for the protection of property in slaves" in the Territory, approved February 3, 1859, is claimed on the ground that a general right to "disapprove," and declare "null and of no effect," all laws of the legislative assembly of the Territory, was reserved to Congress expressly in the organic act. That there is such a general reservation, in terms, embodied in the organic act, is certain. But it does not therefore follow, as a consequence of the reservation, that the right to disapprove of every law passed by the legislative assembly of the Territory results from it. On the contrary, it is plain, upon every known rule of construction, that no such right exists, or was intended to be given, under that reservation.

It was the design of Congress, in passing the act, to give to the people of New Mexico the right of self-government with respect to their domestic concerns. This is evident from the whole tenor of the action of Congress. The permission accorded to them to exert, through their representatives, the political power of legislation for themselves, subject only to the condition that their legislation should not conflict with the provisions of the Constitution of the United States, or with those of the organic act, was a concession to them from the United States, the rightful sovereign of the territory, of the power to exercise what a writer on the public law designates as "the internal and permanent rights of sovereignty" in their own territorial limits. The provision in the act requiring all the laws passed in the Territory to be submitted to Congress, and giving to Congress the power, if they are disapproved, of annulling them and destroying their force and effect, was introduced into it with but a single object, viz: to enable Congress to prevent any violation of the condition imposed on the legislative power conceded, by enabling it to examine for itself into the character of the acts passed, with a view to setting those aside which should be in conflict with the provisions of the national Constitution, or those contained in the act conceding the power to legislate. No right to annul a law which does not contravene some provision of the Constitution of the United States, or of the organic act, can be derived from the reservation spoken of, unless vio-

lence is done to the plain import and meaning of the words of the whole section in which it is contained, or it is considered that, though the power to legislate on all rightful subjects of legislation was given in express terms, it was not intended it should be exercised.

The right of self-government was conceded to the people of New Mexico by the organic act, with respect to their internal affairs, as completely as it is exercised in the States under the Constitution, with one single exception. The legislative power in the Territory, as in a State, is general. In a State, as in the Territory, it is subjected to the same restraints—the limitations imposed by the national Constitution. The only difference in the extent of the legislative power conceded to the territorial government from that belonging to a State grows out of the difference in its position as to the United States. A State is an independent sovereignty, which is entitled to exercise within its own limits "every power, jurisdiction, and right" not delegated to the United States by the Constitution, nor prohibited by it to the States; whilst, on the other hand, the Territory is a dependency of the national government, acting as the trustee of the several States; and nothing can be legitimately done within it to destroy or impair the rights of the citizens of the several States to go into it as the common possession of the States, and be protected in their persons and property by the public authority there, so long as it continues in that condition.

The legislative power conferred on the legislative assembly of New Mexico had been exercised nearly nine years by her people, when, in the months of January and February, 1859, they saw fit to pass two laws—one amendatory of the law relative to contracts between masters and servants, and another to provide for the protection of property in slaves in the Territory—on subjects which are necessarily embraced in the power intended to be conferred by the use of the expression "rightful subjects of legislation," employed in the territorial act; and it is forthwith proposed to disapprove of these laws, and declare them "to be null and void, and of no effect," by the action of Congress. And why is this? It certainly will not be pretended that they are not within the scope of the legislative power conferred on the people of New Mexico. One of the laws is merely amendatory of the law in relation to a particular class of contracts which has been in force over that Territory and people for over a century and a half. If the law authorizing this class of contracts were not approved of by the people of New Mexico, it would not have been continued in force. The law amendatory of it was undoubtedly called for by the public sentiment of the Territory, or it would not have been passed. And the same may, unquestionably, be said with respect to the law providing for the protection of property in slaves there. Why, then, we ask, is it proposed, at this time, to annul these territorial laws by the authority of Congress? It is a hostile movement in the prosecution of the war now waged by a sectional party in the Union against the institutions of the people of another portion of the Union; and if it should be carried into an act, it would be a palpable usurpation of power by Congress; a breach of the compromise entered into in 1850 between the northern and southern people, through their representatives in

Congress, of which the very act in question made a part; and will be subversive of the rights of our citizens established in New Mexico under the principles of the Constitution.

The attempt to annul the act of New Mexico for the protection of property in slaves is a blow aimed at slavery itself. Without the police regulations embodied in that act slavery cannot long exist in the Territory; and the design of the movers of the bill is to exclude slavery from New Mexico altogether by congressional action. But if any one thing, of a political nature is more certain than another, in the eye of reason, it is that Congress can do nothing in that direction. As we have already said, Congress can no more legislate to exclude slavery from a Territory than it can from a State. The want of legislative power in Congress over the whole subject, in the Territories as well as the States, is absolute, because it is one of local or municipal concern, and no legislative power whatever, of that nature, has been given to Congress by the Constitution. What Congress cannot do directly it certainly cannot do indirectly. The pretence that it may be done by interposing a congressional veto upon the action of the territorial legislature in this case is too shallow to veil the real motive. Whatever color there might be for the interposition of the congressional veto in other cases, there certainly can be none with respect to a law for the protection of slavery. Such an exercise of the legislative power was contemplated in the territorial act itself. That act specially provided, in the second section, that, when admitted as a State, the Territory should be admitted into the Union with or without slavery, as might be prescribed in their constitution at the time of admission. What was the scope of that provision? It looked forward to the adoption of the institution of slavery by the people of New Mexico, in their territorial condition, if they desired it: for of what possible avail or utility to them, or to the people of the south, for whose benefit it was adopted, would that provision have been if the right to adopt the institution in the Territory had not preceded the formation of a constitution on its becoming a State? To deny this, and defeat the legislation of the Territory for the protection of property in slaves whenever the people there choose to adopt such legislation, would not only be a usurpation of power by Congress, but a most complete abrogation of the compromise of 1850. This is too plain to require any further comment.

Nor can the power of Congress be exerted, as proposed in the bill under consideration, without a departure from a great principle of constitutional right, recognized in the act creating the territorial government of New Mexico, and without an entire overthrow of the right of self-government in their domestic concerns, which has been solemnly conceded to the people of New Mexico by the government of the United States, after the maturest deliberation, and in strict consonance with the fundamental principles of our system of government.

The right of the citizens of the United States, in their capacity of citizens of their respective States, to enter the common possessions of the United States acquired by conquest or treaty, with all the rights appertaining to them in their own States, and to be protected while there in the enjoyment of these rights by the federal authority so long as the

undivided sovereignty of the United States is exerted over them, is indisputable, as we before said, under the principles of the Constitution and of the public law of nations. This right, however, of citizens as individuals, great as it is, is subordinate to the greater rights of the citizens of the United States in their collective capacity, when organized into political communities with the consent and by the authority of the government of the United States. Certain rights of sovereignty within their national limits and over their relations with foreign countries are vested in the government of the United States by delegation. But the absolute sovereignty of the nation resides in the people of the several States. This is apparent from the most cursory examination of the great charter of our government as originally prepared by its framers. But the fact was not left to be established by construction. The convention of a number of the States, at the time of adopting the Constitution, expressed a desire, in order to prevent misconstruction as to the extent of its powers, that a declaratory clause should be added to it; and this was accordingly done in the first year of the national existence by the adoption of the tenth article of the amendments to the Constitution, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This reservation, in favor of the people as well as of the States, of powers not delegated, could have no possible effect, unless it was to operate in their behalf when they passed beyond the boundaries of the States constituting the Union, and was designed to secure them in the possession of the rights of self-government in the common possessions of the United States when they were assembled together in them in sufficient numbers to form new communities. At the time when this express reservation was made, the unoccupied territories of the United States, lying beyond the boundaries of the several States, were in the course of rapid settlement by our own citizens going into them from the States to which they had respectively belonged, and provision had been made by the confederated States, acting in their sovereign capacities through their accredited delegates, for the exercise of the right of self-government on the part of the emigrants in the ordering of their internal affairs, when "five thousand free male inhabitants, of full age," were shown to exist in a particular district of country; and for the erection of the territory occupied by them into a State, by the formation by themselves "of a permanent constitution and State government," whenever such district contained "sixty thousand free inhabitants," and for its admission, "by its delegates into the Congress of the United States," under the old confederation, "on an equal footing with the original States." The reservation to the people, as distinguished from the States, of powers not delegated to the United States by the Constitution, can by no possibility apply to the people as citizens of a State, for there the citizens of a State are themselves "the State." The absolute and undivided sovereignty of the State, resides in them; the constitution and laws which form the government of a State and fashion and control its domestic institutions, are but emanations of their will, and subsist or disappear and take new shapes at their pleasure. A reservation of power to a State is nothing more nor less

than a reservation of power to the people of a State ; the reservation of " powers not delegated," made in the tenth article of the amendments to the Constitution, " to the people," in addition to that before made in the preceding words "to the States respectively," must necessarily have been intended to operate in some manner for the benefit and advantage of " the people of the United States " as contradistinguished from the people of the several States ; and, in our opinion, it does so operate as to secure to them the rights of self-government in the territories held as common possessions of the United States by the national authority when their numbers are sufficient to constitute a distinct political community, and there is nothing in their situation which makes it proper or desirable, in the public interest, that the exercise of that right should be temporarily withholden from them.

There can be no doubt that instances have already occurred, and that they may again occur in our history, in which it is not only the right but may be the duty of the national government to withhold the power of internal self-government for a time from the people of a territorial possession. That was undoubtedly the case with respect to Louisiana and Florida after their acquisition by treaty, because of their want of knowledge of the practical workings of that system at the time. And it is also possible, when the exercise of that right has once been conceded to a political community occupying a Territory of the United States, that it may become necessary to withdraw the power to do so, as it is likely will be the case, at no distant day, hereafter, in regard to Utah. The political sovereignty of the United States can only be divested in one of two ways, viz : by the voluntary relinquishment of the Territory, which would result from returning it to its former possessor by treaty, or the entire abdication of all power over it, without such a return to its former possessor, so that it would become an independent State, with all the rights of both internal and external sovereignty, like any other independent State of the world ; or by its admission into the Union as a new State, under the Constitution, when it would also become a sovereign and independent State, but so situated, under the paramount authority of the federal Constitution, that, though left to exercise the internal and permanent rights of sovereignty within its own limits, it would be obliged, whilst it remained a member of the federal Union, to permit the federal govment, in virtue of the delegation made to it through the Constitution, to exercise all her external rights of sovereignty concerning her relations with foreign states, whether of peace or war. Until the divestiture of the sovereignty of the United States over a territorial possession in one of these ways it continues to exist. Any delegation of political power for its government, while in a territorial condition, is necessarily temporary in its very nature, and is liable to be resumed by the federal government whenever the public good requires it, and the resumed power may be delegated anew, to be exercised in some new manner, for the preservation of the rights and the advancement of the interests of the people. It is only in an extreme case, however, when the danger is imminent and the advantage great, that a resort to the resumption of the political power once granted to the people of a Terri-

tory for their temporary government should be resorted to. But the right itself is a necessary incident of the power and right to govern.

In the exercise of the power to govern a Territory, the government of the United States, it is true, has, from necessity, the sole right to decide upon the manner in which it is to be exerted. But this is not an absolute right to be exercised at its mere discretion. It is to be exerted through the agencies appointed by the Constitution, and in obedience to its principles. The United States cannot provide for the regulation and control of the rights of property, and of the rights and duties of men in their various relations with each other in the Territories, by a direct exercise of legislative power through Congress. This, as we have before shown, is impossible, because no legislative power over such subjects is vested in Congress by the Constitution. The only mode in which it can be effected is by the organization of a territorial government, and conferring upon it, in the exercise of the national rights of sovereignty, such political powers, to be exerted through the agency of persons appointed by the executive authority of the United States, or elected by the people of the Territory, as may be necessary for the attainment of the end aimed at. The last mode—the one most in consonance with the spirit of our institutions, and which is in entire accordance with Constitutional principle—was adopted in regard to New Mexico, after the fullest consideration, and under circumstances of such national solemnity as made it certain that the act adopting it met the hearty concurrence of the whole American people; and we are now asked, though our situation is absolutely unchanged, to overturn that great work, which concerns a whole people, upon a pretence that would be scouted out of any court of justice, on an issue made before it in which the merest personal interest of a simple individual was involved!

What are we coming to? Is it the intent of any considerable portion of our people that an imperial power shall be hereafter exercised by Congress in the territorial possessions of the United States? Is the federal government to put off "the character impressed on it by those who created it" when it enters into our common territories, and assume "despotic powers which the Constitution has denied it?" A great judicial authority has said, in a late recorded opinion of signal importance, that the national government enters into our common possessions "with its powers over the citizen strictly defined and limited by the Constitution, from which it derives its own existence, and by virtue of which it alone continues to exist and act as a government and sovereignty?" And the same authority adds that the federal government "has no power of any kind beyond it," &c. The tendency of things abroad, even in those countries subjected, almost from time immemorial to despotic sway, is, to the exercise of all the great powers of government, in accordance with the movements of public sentiment. And now, we would ask, Can it be the intent and design of any party in the "model republic" to repudiate the exercise of the power of self-government by the people of a Territory when it can be safely accorded to them under the principles of the Constitution, and that, too, at the very time when imperial France is engaged

in introducing the principle of "satisfied nationalities" into the political system of continental Europe?

The right of self-government is the corner stone of our national edifice. It is the very sun of our political system, which, by its pervading force, sustains in their positions the various governmental bodies entering into it, gives them motion, and, by its continued influence, enables them to move silently and harmoniously, each in its appropriate sphere, in the direction required for the promotion of the interests of the common whole. Unhappy, indeed, is he among the American people who cannot see and feel and recognize the existence of this great principle. The people of the Territory of New Mexico are now in the possession of this right within their own limits in virtue of a delegation of political power rightfully made to them by the sovereignty of the United States through its constitutional organs, and they have done nothing since to forfeit or make them unworthy to exercise it, or which can justify Congress in any attempt to withdraw it, or to hinder or impair its exercise by them, directly or indirectly, in in any way, shape, or manner whatever. And for that reason, and for the reasons already given, we now say that it is our settled conviction that the proposed bill is in direct opposition to the principles of the compromise of 1850, which were recognized and established in their operation over the Territory of New Mexico by the provisions of the organic act itself; that it is in opposition to the rights of the former people of New Mexico under the treaty of cession; and that it is subversive of the rights and privileges under the Constitution of the United States of the citizens of the several States who are at this time established there. And we therefore respectfully recommend that the bill be rejected.

MILES TAYLOR.